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SYARIKAT AMIN ENTERPRISES

v.

EDWINA LAU

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 11-02-2007-II]
29 JUNE 2007

C ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Setting aside - Application for - No appearance entered by defendant - Defendant not served with summons - Defendant not aware of date for appearing in court - Proposed defence and counterclaim showed merit - Court to consider regularity of judgment and defence on merits - Judgment set aside*

D ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Setting aside - Power of subordinate courts to set aside default judgments - No clear provision in Subordinate Courts Rules, 1980 for setting aside judgment in default - Subordinate courts obliged to follow practice and procedure followed by High Court pursuant to O. 1 r. 4(1) of the SCR 1980 - Court has absolute discretion*
E *to set aside judgment in default*

CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside - Time - Application to set aside must be made within a reasonable time - Whether courts have discretion to disregard lapse of time*

F ***CIVIL PROCEDURE:*** *Irregularity - Proceedings, irregularity in - Preliminary objections - Courts established to hear merits of case and not to dismiss for non-compliance of rules - Solicitor reprimanded for raising unmeritorious preliminary objections - Show cause letter issued to solicitor - Solicitor to pay costs personally*

G The appellant/defendant appealed against the decision of the learned magistrate who refused to allow the defendant's application to set aside the judgment in default of appearance. The appellant claimed that the learned magistrate did not consider the merits of the application but decided to dismiss the application on the grounds of two preliminary
H objections made by the respondent without prior notice to the appellant. The preliminary objections raised were as follows: (a) that the learned magistrate had "no jurisdiction/power to set aside judgment in default"; and (b) the said application was filed "out of time" with reference to O. 29 r. 14 of the Subordinate Courts Rules 1980 (SCR). In this
I appeal, the respondent raised two more preliminary objections namely: (i) that the record of appeal was defective since it contained a Draft Order which had not been approved by the registrar; and (ii) that the

Supplementary Record of Appeal was filed out of time without leave and that it contained only an uncertified photostat copy of the Draft Order. The proposed defence and counterclaim of the appellant were contained in the affidavit.

Held (allowing the appeal):

(1) The defendant did not enter the appearance because the defendant was not served with the summons and the defendant *bona fide* was not aware of the date for appearing in court. Further, the proposed defence and counterclaim *prima facie* showed merit. In consequence, the court had no hesitation in setting aside the default judgment. (para 6)

(2) There is no clear provision in the SCR 1980 for setting aside judgment in default of appearance or defence. However in the Rules of the High Court 1980 there are clear provisions to set aside judgment in default of appearance and in default of defence pursuant to O. 13 r. 8 and O. 19 r. 9 respectively. The subordinate courts are obliged to follow the practice and procedure followed by the High Court pursuant to O. 1 r. 4(1) of the SCR 1980. The court has an absolute discretion to set aside a judgment in default of appearance. The application to set aside must be made within a reasonable time. However, in a fit and proper case, the court will disregard the lapse of time. (para 6)

(3) The court as a general rule does not set aside a default judgment unless the defendant can establish that the judgment obtained was irregular or defence on the merits to the plaintiff's claim. (para 6)

(4) The courts are established to hear merits of the case and not to dismiss for non-compliance of rules. The preliminary objections of the respondent had no merits and did not reflect the contemporary jurisprudence to procedural non-compliance. The solicitor's conduct to prefer preliminary objections to stop the defendant from exercising his right to be heard was a matter which the court noted with great disgust. The court directed the registrar to issue show cause letter to the solicitor as to why he should not pay costs personally, pursuant to O. 59 r. 8 of RHC 1980. (paras 7 & 8)

Case(s) referred to:

Anthony Goh Khiok Loong v. Chan Yam Heng & Anor [2006] 7 CLJ 309 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 ***(refd)***

Barnes v. Kondel [1971] 1 Lloyds Rep 544 ***(refd)***

Capital Insurance Bhd v. Kassim Mohd Ali [2000] 1 CLJ 269 CA ***(not foll)***

Chua Liong Hai & Ors v. Lian Soon Industries Sdn Bhd [2004] 8 CLJ 117 HC ***(refd)***

A *Dato' Ting Check Sii v. Datuk Hj Mohamad Tufail Mahmud & Ors [2007] 1 LNS 107 HC* ***(refd)***
Evans v. Bartlem [1937] AC 473 ***(refd)***
Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***
Kandaraju Frapatan v. MBf Finance Bhd [2006] 7 CLJ 27 HC ***(refd)***
B *Lim Cheng Hai & Anor v. ZKP Development Sdn Bhd [2002] MLJU 232* ***(refd)***
Megat Najmuddin Dato Seri Megat Khas v. Bank Bumiputra Malaysia Bhd [2001] 1 CLJ 391 CA ***(not foll)***
Mohamad Nazri Ali v. Abdullah Sidek [2002] 2 CLJ 744 HC ***(refd)***
Mokhtar Amin v. Omar Mat Ziki [1998] 1 CLJ 119 HC ***(refd)***
C *SA Andavan v. Registrar of Titles, Negeri Sembilan & Ors [1977] 2 MLJ 220* ***(refd)***
Sockalingam Chettiar & Ors v. Somasundaram Chettiar [1941] MLJ 103 CA ***(refd)***
United Oriental Assurance Sdn Bhd v. Ng King See [1986] 1 LNS 87 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 13 r. 8, O. 19 r. 9, O. 42 r. 13, O. 59 r. 8(4)
D Subordinate Courts Rules 1980, O. 1 r. 4(1), O. 49 r. 6(3)(d)

For the appellant/defendant - Henry Ling; M/s Ling & Wong Advocates
For the respondent/plaintiff - Tan Chuo Huat; M/s Tan Advocates

E *Reported by Amutha Suppayah*

JUDGMENT

Hamid Sultan Abu Backer JC:

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[1] This is my judgment in respect of the appellant/defendant's appeal against the decision of the learned magistrate who refused to allow the defendant's application to set aside the judgment in default of appearance on the grounds of two preliminary objections raised by the respondent.

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[2] The appellant complaints that the learned magistrate did not consider the merits of the application but decided to dismiss the application on the grounds of two preliminary objections made by the respondent without prior notice to the appellant. The preliminary objections raised are as follows:

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(a) the learned magistrate has "no jurisdiction/power to set aside judgment in default" in reliance of the case of *Mohamad Nazri Ali v. Abdullah Sidek* [2002] 2 CLJ 744 and *Chua Liong Hai & Ors v. Lian Soon Industries Sdn Bhd* [2004] 8 CLJ 117.

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(b) the said application was filed "out of time" with reference to O. 29 r. 14 of the Subordinate Courts Rules 1980 (SCR) and *Kandaraju Frapatan v. MBf Finance Bhd* [2006] 7 CLJ 27, and *Anthony Goh Khiok Loong v. Chan Yam Heng & Anor* [2006] 7 CLJ 309.

[3] Before this court, the respondent also raises two more preliminary objections namely:

(i) the record of appeal herein dated 5 March 2007 is defective for failure to comply with O. 49 r. 6(3)(d) of the SCR 1980 which requires "the order or draft order of the decision appealed from" to be included in the record of appeal, and relies on the case of *Lim Cheng Hai & Anor v. ZKP Development Sdn. Bhd.* [2002] MLJU 232, where it was held that the meaning that ought to be given to the words "draft order" in O. 49 r. 6(3)(d) of the SCR 1980 is the draft order that has been approved both by the respondent's solicitors and by the registrar. As the record of appeal in that case contained a draft order which was not approved by the registrar, the court there held that the record of appeal was defective and could not be cured, and dismissed the appeal. Similarly, the respondent says the record of appeal contains a draft Order which had not been approved by the registrar. Further, the respondent says notice of intention to raise preliminary objection to the appellant has been given but such notice is in fact unnecessary on the grounds that in *Lim Cheng Hai & Anor v. ZKP Development Sdn. Bhd. (supra)*, it was said as follows: (i) such defect cannot be cured. (ii) even the lack of objection from the respondent against the defect will not make the record of appeal complete and in order. (iii) the court on its own was duty bound to ensure that the procedure and rules of court were followed by litigants

[4] Further, the respondent files a further preliminary objection stating: (i) the appellant has filed a "Supplementary Record of Appeal" on 14 May 2007. (ii) this "Supplementary Record of Appeal" is filed out of time without leave and ought to be struck out. (iii) the "Supplementary Record of Appeal" contains only an uncertified photostat copy of the draft Order. Hence, the respondent says that the "Supplementary Record of Appeal" is bad in law and should be set aside and relies on the Court of Appeal decision which has been overruled by the Federal Court. I do not know whether the respondent is making an attempt to mislead the court here or is, in ignorance, relying on the Court of Appeal decision which has been overruled namely, *Megat Najmuddin bin Dato Seri Megat Khas v. Bank Bumiputra Malaysia Bhd* [2001] 1 CLJ 391 CA and *Capital Insurance Bhd v. Kassim bin Mohd Ali* [2000] 1 CLJ 269 CA.

[5] The proposed defence and counterclaim of the appellant as per affidavit reads as follows:

1. … The defendant avers that the said letter of undertaking to pay fee was only effective if the plaintiff provided consultancy advisory services on the intended arbitration with Jabatan Kerja Raya Sarawak to the defendant, and at all material times the plaintiff did not render any such service to the defendant or at all, and that the defendant had settled the claims amicably with Jabatan Kerja Raya Sarawak without any service of the plaintiff.

2. ….

3. The statement of claim is disputed. The defendant avers that the agreed charge of 20% on the sum recovered was only payable if the plaintiff had acted for the defendant in arbitration and/or negotiation with Jabatan Kerja Raya, Sarawak, and that there was neither service of arbitration nor any negotiation rendered by the plaintiff for the defendant, the plaintiff was and is not entitled to any remuneration or fee at all.

4. The plaintiff had not provided any consultancy advisory services or appears in person or otherwise in connection with the arbitration proceeding or negotiation with Jabatan Kerja Raya, Sarawak for the defendant.

5. The defendant avers that the plaintiff had no skill or knowledge of any arbitration or negotiation works, and that the defendant did not sign or enter into any deed of settlement with the Government of Sarawak.

6. The defendant avers that Jabatan Kerja Raya, Sarawak had paid the settlement sum to the defendant after the partners of the defendant made presentation to officers of the Government and the claims under contract No. PWD/HO/B035/1998 was settled prior to and before commencement any arbitration or negotiation work on the part of the plaintiff if any.

7. …

8. The defendant avers that the said RM57,393.23 was paid to the plaintiff only the threatening misconduct of one James Lim who requested and induced the partners of the defendant to pay the said sum as final and full settlement for his role as debt collector under contract No.PWD/HO/B035/1998 despite his service was not required, and that after the defendant's payment of the said RM57,393.23, the plaintiff and the said James Lim demanded for another RM14,606.77 from the defendant, and that the plaintiff was neither a debtor collector nor the person who had ever provided any services to the defendant and hence was and is not entitled to the said RM57,393.23 or any sum at all.

9. The defendant further avers that as the plaintiff had not provided any consultancy advisory services on the arbitration or negotiation or at all to the defendant there was no breach of undertaking, and that the said payment of RM57,393.23 was not for the service of any consultancy advisory services on the arbitration or negotiation other than the resulting misconduct of the said James Lim who threatened to take irresponsible action against the partners of the defendant.

10. ...

PROPOSED COUNTERCLAIM

11. ...

12. On the occasion mentioned in paragraph 8 and 9 of the defence herein, the defendant is entitled to claim the refund or restitution of the said RM57,393.23 and there was no consideration on the payment of the said RM57,393.23 or for the money had and received on the ground that there had been a total failure of consideration. The plaintiff is liable to refund or restitution of the said RM57,393.23 to the defendant with interest at the rate of 8% per annum from the date of the counterclaim herein till the date of full settlement.

[6] I have read the appeal record in full and the affidavit explaining the reasons for not entering appearance and the contents of the proposed defence. The reason for not entering the appearance is stated because the defendant was not served with the summons and the defendant *bona fide* was not aware of the date for appearing in court. Further, the proposed defence and counterclaim *prima facie* shows merit. In consequence, I will have had no hesitation in setting aside the default judgment as the law in this area can be summarised as follows:

(a) Judgment in default of appearance is judgment given to the plaintiff without the court hearing the merits of the plaintiff's case. The court has absolute discretion to set aside the judgment on the application of the defendant. There is a requirement under O. 42 r. 13 RHC 1980 that a party intending to set aside or vary the order must make his application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him. There is no clear provision in the SCR 1980 for setting aside judgment in default of appearance or defence. However in the RHC 1980 there are clear provisions to set aside judgment in default of appearance and in default of defence pursuant to O. 13 r. 8 and O. 19 r. 9 respectively. In consequence, the subordinate courts are obliged to follow the practice and procedure followed by the High Court pursuant to O. 1 r. 4(1) of the SCR 1980.

(b) In *Evans v. Bartlem* [1937] AC 473, Lord Atkin observed:

> The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained by a failure to follow any of the rules of procedure.

(c) In *Barnes v. Kondel* [1971] 1 Lloyds Rep. p. 544, Lord Denning MR stated that a 'defence on the merits' means a defence which discloses an arguable and triable issue. The court has an absolute discretion to set aside a judgment in default of appearance. In *Sockalingam Chettiar & Ors v. Somasundaram Chettiar* [1941] MLJ 103 CA, it was stated that it was fundamental that a person should have notice of the proceedings against him and even when an order for substituted service has been made, a judgment can be set aside when merits are disclosed and when the court is satisfied that the defendant was not aware of the proceedings and was not avoiding service which is tantamount to knowledge of the proceedings. The application to set aside must be made within a reasonable time. However, in a fit and proper case, the court will disregard the lapse of time.

(d) In *SA Andavan v. Registrar of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220, it was opined that the court may discharge an irregular order without an application being made for this purpose. Further, under this rule, the court may set aside or vary the judgment on the application of either parties.

(e) The court as a general rule does not set aside a default judgment unless the defendant can establish: (a) the judgment obtained was irregular; or (b) defence on the merits to the plaintiff's claim. In *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23, HRH Raja Azlan Shah CJ (as HRH then was) observed:

> It is clear that the application to set aside the judgment in default was made under Order 13 rule 10 of the Rules of the Supreme Court. The rule provides:
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> > Where judgment is entered pursuant to any of the preceding Rules of this Order, it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may be just.
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> The rule gives the court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the

merits. An appellate court can only interfere with the exercise of the discretion if the court below has clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration. I cannot think that in dealing with the application under Order 13 rule 10 the learned judge committed any error of law. Neither did he fail to consider all matters demanding consideration nor act on any wrong principle. In my view all the elements are present in this case which would justify the exercise of discretion in favour of the respondents.

In my view, the respondents have disclosed a defence on the merits.

(f) In *Mokhtar Bin Amin v. Omar B. Mat Ziki @ Mohd. Ziki* [1998] 1 CLJ 119 HC, among the issues debated on was whether the defendant's application to set aside the judgment was time barred pursuant to O. 42 r. 13. The court held that lapse of time is not a bar to an application to set aside a defective judgment. In setting aside a judgment, the court can exercise its inherent jurisdiction without the need to have recourse to the Rules, dealing expressly with proceedings to set aside orders for irregularity. As an irregularly, obtained judgment may be set aside *ex debitio justitiae*, the imposition of any time limit would be inconsistent with the exercise of such a right. The courts stated that there cannot be any restriction by way of time period, within which an application to set aside such a judgment should be made, as an irregular judgment can be discharged or ignored even without an order being made to that effect. In consequence, the court asserted that the provisions of O. 42 r. 13 of the RHC 1980 are inapplicable.

(g) Any application to set aside judgment in default must be made within a reasonable time. Inordinate delay may defeat the application. In *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32, the plaintiffs had built houses for the defendant at their request. The plaintiffs claimed certain sum was due and owing and obtained judgment in default of appearance. The defendant thereafter made an application seeking leave to enter appearance and to set-aside the judgment. The learned trial judge dismissed the application on the ground that the defendant was not able to account for the delay in making the application and the reason for not entering appearance. Further, the learned judge stated that it was not necessary for him to consider the merits of the case. The defendant appealed. The Supreme Court stated:

(i) Where an application is made for setting aside a judgment in default the learned judge would have to consider the merits of the case.

A (ii) Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court, 1980, the court has an absolute discretion to set aside the judgment on terms and allow the case to be heard on the merits.

B (iii) As to delay there is no rigid rule that an applicant must satisfy the court that there is a reasonable explanation only when judgment was allowed to go by default. Obviously the reasons, if any, for allowing the judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion.

C (iv) The application should clearly be made promptly and within a reasonable time. But the court will in a fit case disregard lapse of time.

(h) In *United Oriental Assurance Sdn Bhd v. Ng King See* [1986] 1 LNS
D 87, the court allowed a judgment in default of appearance to be set aside even though the defendant filed an application to set aside the default judgment after three years. Yusof Mohamed J observed:

> The rule is that such application must be made promptly and within a reasonable time. But the rule also allows the Court in
E a proper case to disregard the lapse of time.
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> In the present case, the claim is for reimbursement of money already paid. Although the delay was necessarily long, the defendant was given reasonable grounds challenging the substituted service of the Writ. There are also points of law
F raised which are of public interest whether such manipulation by the insurers would bind the defendant. The plaintiffs are not in any way prejudiced by the delay.
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> In these circumstances I find that this is a fit case to disregard the lapse of time.
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[7] Before I can deal with the appeal, I must deal with the preliminary objection to this appeal. I find that the respondent's reliance on case which was decided in [2002] MLJ 232 does not reflect the contemporary procedural jurisprudence in this area of law. The courts
H are established to hear merits of the case and not to dismiss for non-compliance of rules. This has been repeatedly articulated by our apex courts from time to time, according to the exigency of cases. There are a plethora of authorities. I have dealt with them in detail in my judgment in the case of OP-26-05-2006-II *Dato' Ting Check Sii v. Datuk Haji Mohamad Tufail bin Mahmud & Ors* [2007] 1 LNS 107 HC
I delivered on 25-04-2007 and as the same principles apply here, I reproduce the relevant parts which read as follows:

15. Court's time is often unnecessarily wasted by procedural objections and technicalities raised without regard to rules and case laws which condone procedural non-compliance. To avert frivolous objections it is an opportune moment to summarise the rules and principles in vogue and they are as follows:

(a) As a general rule, the parties to a civil proceeding must strictly comply with the rules of the court. However where parties have by reason of anything done or left undone failed to comply with the requirements of the rules of the court, whether in respect of time, place, manner, form or content or in any other respect, the court is required to treat the failure of non-compliance as an irregularity and the failure does not nullify the proceedings or any steps taken in the proceedings or any documents, judgment or order therein. This rule has a number of exceptions and will only appear to cover steps taken in the course of commencement of any proceedings and will not include any steps which is a condition precedent before instituting proceedings.

(b) Dismissal of an action for non compliance of procedural rules has been an anathema in procedural jurisprudence. To avert procedural miscarriage of justice, order 2 of the Supreme Court Practice (white book) was introduced in England. It was meant to be a saving provision to condone procedural irregularities. However, some English judges often defied this sacrosanct provision and in consequence matters were dismissed without merits being heard. The English position is aptly described by Sir Jack I.H. Jacob in his book "The reform of the *Civil Procedure Law* and other Essays in Civil Procedure London", 1982, London, Sweet & Maxwell at page 214 as follows:

> A change of fundamental importance was made in relation to the effect of non-compliance with the requirements of the Rules. In all such cases, such non-compliance whatever form it takes must be treated, not as a nullity, but as an irregularity which the court will have power to amend or rectify or regularize. This power, together with the extended powers of amendments after the expiry of the current period of limitation, is intended to prevent technical defects or errors in proceedings from being fatal in themselves and to remove some of the blots which "have marred our copybook." They go a long way towards reaching out to the rather exuberant remark made by Lord Bowen that "It may be asserted without fear of contradiction that it is not possible in

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> the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." This ideal state has yet to be achieved.

In Malaysia, the Chief Justice Yang Amat Arif Tun Dato' Sri
B Ahmad Fairuz whilst sitting in Court of Appeal in the case of *United Malayan Banking Corporation Bhd v. Earnest Cheong Yang Yin* [2001] 2 CLJ 31, has shown the lead and rightly said that procedural and technical objection must not be allowed to obstruct the process of giving justice.

C Justice Abdul Hamid Mohamad FCJ sitting in the Court of Appeal in the case of *Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor* [2001] 4 CLJ 1, had boldly asserted that the main function of the court is to do justice and not just to dispose cases. Further, His Lordship stated that it was unjust to dismiss a matter without hearing merits simply because of the
D mistake of the solicitor in not complying with the rules.

Justice Gopal Sri Ram JCA had in *Mokhtar Bin Amin v. Mohamed Mokhtar Bin Omar* [2001] 4 MLJ 329, placed the nail on the coffin in respect of procedural objections by stating that non-compliance of procedural requirements should not be treated as
E invalidating any action or proceeding or steps taken therein unless it occasions a substantial miscarriage of justice.

(c) From the cases above it is clear that the court has a wide discretion whether to condone or not to condone irregularities. In this context it is noteworthy to be guided by
F the observation of Suffian LP in the case of *Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 where His Lordship observed:

> The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil
G justice.
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> In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
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> But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.

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This change of attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear*:

> Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

Today Order 70 rule 1 of our Rules explicitly states that non-compliance with our Rules:

> Shall not render any proceedings void unless the court or a judge shall so direct ...

(d) When non-compliance does not occasion any injury and cause no injustice to the opposite party or where they can be sufficiently compensated by costs or other terms imposed by the court, I take the view that the courts have a constitutional duty to hear the cases on merits. However, the power to condone non-compliance though discretionary must be exercised judicially on proper consideration within the spirit of the Federal Constitution and of the special circumstances of each case.

16. The respondents in this case take serious objections to non-compliance and on the facts of this case it cannot be said it is not without merits. However, the cases which they have relied on do not reflect the contemporary thinking and approach taken by our apex court in this area of procedural jurisprudence. The distinction in the instant case is that an ample opportunity was given to the applicant to set out the grounds for the application and the applicant has refused to do so and proceeded to file the summons in chambers in breach of Order 32 rule 1 of RHC 1980 and of Form 62. To my mind, such conduct is an abuse of the process of court and ought to be dealt with punitive measures by ordering the solicitors to personally bear the costs of the application. I take the view that it is important and necessary for quick appreciation of the grounds the application, Form 62 must be complied with. Where there is non-compliance of form 62, the court must insist on the same and give an opportunity to the applicant to comply with it, failing which the application must be dismissed with costs and the costs must be personally borne by the solicitors. For purpose of completeness, I must also add that any solicitor who takes unmeritorious procedural objections must be made liable to pay costs

A personally. Such an order will arrest procedural skirmishes in limine and pave way for cases to be heard on merits and this will also be a good step to reduce backlog of cases, as it will act as a deterrent to file unmeritorious application or raise objections.

[8] For reasons stated above, I find that the preliminary objections of B the respondent here, as well as in the court below, have no merits and do not reflect the contemporary jurisprudence to procedural non-compliance. Further, from the facts of this case, the solicitor's conduct to prefer preliminary objections to stop the defendant from exercising his right to be heard is a matter which this court notes with great disgust. C In fact, I take the view the relevant provision of the legal profession practice rules must be amended to stop solicitors to take preliminary objections which will deny the opposing party to be heard. The right to be heard, which is one of the cardinal principles of natural justice and elevated to one of fundamental rights under various provisions of the D Federal Constitution, need not be emphasised here. Solicitors being officers of court, who try to obstruct the intent and spirit of natural justice and the Federal Constitution, must be severely dealt with. Notwithstanding rules which restrict or prohibit preliminary objections taken to defeat cause of justice, on my part I have already placed a preliminary caution to solicitors not to raise preliminary objections in one E of my recent decisions. To arrest such practice which brings disrepute to administration of justice, I am going to direct the registrar to issue show cause letter to the solicitor in this case as to why he should not pay costs personally, pursuant to O. 59 r. 8 of RHC 1980. For this purpose, I propose to invite the representative of the Sarawak Advocates F Association in line with the provision of O. 59 r. 8(4) which states:

> The Court may, if it thinks fit, direct or authorize the Bar Council to attend to take part in any proceedings or inquiry under this rule, and may make such order as it thinks fit as to the payment of his costs.

G **[9]** For reasons stated above, I allow the appeal and make the following orders:

(i) The order of the learned magistrate be set aside.

(ii) The default judgment dated 14 August 2006 be set aside.

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(iii) The defendant be granted two weeks to file the defence.

(iv) This matter be fixed for mention in the magistrate's court within two weeks from today.

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(v) The court to reserve the order as to costs pending the hearing of the show cause letter to the solicitor as to why the solicitor should not personally pay costs.

(vi) The registrar to issue the show cause letter and the matter be fixed for hearing before me within 1 month from the date of this order.

I Hereby Order So.